In The

Supreme Court of the United States

October Term, 1976

No. 76-1541

International Terminal Operating Co., Inc.,
Petitioner,

vs.

[illegible]

and

Director, Office of Workers' Compensation Programs,
United States Department of Labor,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 76-

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

vs.

CARMELO BLUNDO

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 1, 1976.

OPINIONS BELOW

This matter arises under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The Decision and Order of the Administrative Law

Judge, and the order amending the Previously Issued Decision and Order, were entered on March 3, 1975, and April 18, 1975, respectively, and appear at pages 49a and 60a as Appendices C and D to this Petition. (All page citations to the Appendices to this Petition are hereinafter preceded by the designation "A.") The Decision of the Benefits Review Board of the Department of Labor affirming the Decision and Order of the Administrative Law Judge and dated October 30, 1975, appears as Appendix B hereto (A. 45a). The majority and dissenting opinions and judgment of the Second Circuit Court of Appeals, decided July 1, 1976, affirming the Decision of the Benefits Review Board, have not been officially reported but are printed as Appendix A hereto (A. 1a). In addition, the opinions of three other Courts of Appeals which have not yet been officially reported but which are relevant to this case are printed as Appendices E (A. 62a), F (A. 90a) and G (A. 113a) hereto.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on July 1, 1976 (A. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act were intended to extend federal compensation coverage beyond the point where cargo is first unloaded onto an adjacent pier or similar facility.

2. Whether the 1972 Amendments to such Act were intended to extend coverage to a "stripper" of containers who was not employed by the unloader of the vessel, who was located at the time of injury in a building substantially removed from the unloading area and never used for loading or unloading of vessels, and whose sole duty at the time of the injury was to break down the

container for storage and Customs inspection—particularly where a substantial period of time had passed since the container had been unloaded at some other location.

3. Whether the situs of the accident in this case and the status of the injured employee were such as to meet the requirements of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(a):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. § 903(a):

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but

only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT OF THE CASE

Petitioner International Terminal Operating Company ("ITO") conducts two distinct types of operations in the New York area. One is stevedoring—the loading or unloading of cargo from ships. That operation by ITO is not involved in this case. The other activity is as a terminal operator, including, under contract with other companies, the consolidation or breaking down of cargo which has been or will be shipped on the lines of other carriers. That is the activity involved here.

On January 18, 1974, one of ITO's employees, respondent Blundo, was injured while working as a "checker" at a pier at 19th Street in Brooklyn (CA A. 38a, 45a-46a).[1] The area where he was working was a large one. The pier runs approximately 1000 feet from 19th to 21st Streets and extends approximately 700 feet from the foot of these streets to the seaward edge of the area (CA A. 37a).[2] Cargo is loaded and unloaded from vessels at the seaward edge of the 21st Street pier, but never at the 19th Street pier (CA A. 38a, 54a-55b, 81a; A. 31a n. 19). Nor was the cargo involved in this case unloaded at either the 19th or 21st Street piers.

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[1] "CA A." refers to the Appendix filed in the Court of Appeals, which includes, *inter alia*, the transcript of respondent Blundo's hearing.

[2] The area is fenced in and has two gates (CA A. 35a).

Instead, sometime prior to Mr. Blundo's accident, the particular container at issue [3] had been unloaded from some ship at some destination quite distant from the 19th Street pier. Although no one involved in the accident knew how long ago the container had been unloaded, there was testimony that it could take a week or considerably longer for such containers to reach the 19th Street pier after being unloaded in other sections of New York (CA A. 62a-64a, 69a-70a, 82a). No one involved in the accident knew the name of the ship which had carried the container or which company had unloaded it (CA A. 62a, 81a). It is clear, however, that the unloader had *not* been ITO (CA A. 48a, 55a, 56a, 67a-68a, 81a, 94a).

After the container had been unloaded, it had been carried with other cargo over the public streets to the 19th Street pier by a common carrier trucking company, driven by Teamsters Union members (CA A. 55a-56a, 80a). Sometimes, after delivery at 19th Street, cargo is picked up directly by the consignee, using his own trucks (CA A. 84a-85a). In this instance, however, since duty was owed on this particular container, it had to be "stripped," or broken down, and sent to a bonded warehouse located on the pier for passage by Customs officials before being picked up by the consignee or consignees (CA A. 46a, 97a-98a, 101a, 118a). This stripping was being performed by ITO under contract with American Export Lines, Inc., which owned the container (CA A. 40a, 55a, 68a-69a, 116a).

As a "checker," Mr. Blundo's job was to break the seal around the container, check the contents against his manifest sheet (which showed a description of the cargo, the

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[3] A container is a large crate into which smaller crates, boxes, bags, barrels or other such packages are consolidated for shipment to a single destination, even though the various contents may be meant for multiple consignees (CA A. 82a-85a).

consignee, the value, etc.), and to mark each item as "stripped" (CA A. 69a-73a). These duties are performed in a building used exclusively for storage and stripping and *not* in an area used for the loading or unloading of ships (CA A. 68a, 79a-80a; A. 31a n.19). After the checking, the cargo is then placed on pallets and sent to the bonded warehouse until cleared by Customs and picked up by the consignee or consignees (CA A. 71a, 85a). It was while Mr. Blundo was engaged in the checking process that he slipped on some ice and was injured (CA A. 52a).[4]

Under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, employees who are not covered by the Act are paid under state workmen's compensation laws. In order to be covered by the federal statute, several criteria must be met. Thus, the employee must meet the "status" test as someone engaged in maritime employment, as defined in Section 2(3), and the injury must meet the "situs" test as having occurred upon navigable waters, as defined in Section 3(a).[5]

The Administrative Law Judge and the Benefits Review Board, both of the Department of Labor, held that Mr. Blundo was engaged in maritime employment at the time of his injury and was thus an "employee" as defined by the Act, and that the place of the injury was "upon the navigable waters of the United States" as that term

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[4] Blundo testified that on other occasions he spent as much as 20% of his time performing on-vessel duties (CA A. 43a-44a). This fact was not even mentioned, much less considered important, by either the Administrative Law Judge or the Benefits Review Board in their opinions, and would appear to have been immaterial to the majority below. And yet as to Caputo, who was loading cargo aboard a consignee's truck when he was injured, his similar on-vessel experience was one of *the* crucial factors in the finding by the court below that he was covered by the Act (A. 36a, 39a-40a).

[5] The employer must also meet the test set forth in Section 2(4). However, in this case, petitioner had never questioned that it was an "employer" under the Act, since some of its other employees were engaged in longshoring operations (see A. 54a).

is defined in the 1972 Amendments to the Act (A. 57a, 46a).

These findings were made despite the facts, as set forth above, that:

(a) ITO did not unload the ship.

(b) The unloading was done in an area substantially removed from the scene of the accident.

(c) The container at issue was subsequently carried over the city streets by common carrier.

(d) It might have been a week or longer before the container reached the 19th Street pier after being unloaded from its vessel.

(e) The container was not owned by ITO.

(f) The container was "stripped" in a building not used for loading or unloading ships.

(g) ITO does not load or unload ships at the 19th Street pier.

(h) The injured party's sole duties revolved about checking the contents of the container.

(i) The only step that remained was for the cargo to be passed by Customs officials and picked up by a consignee or consignees.

The Second Circuit split two to one in regard to respondent Blundo. As discussed more fully below, Judges Friendly and Oakes held that Blundo's injury met the "situs" test of the 1972 Amendments (A. 30a n. 19), and that he was covered by the Act because he had stripped the container prior to the point where the consignee had begun its movement from the pier (A. 39a).

Judge Lumbard dissented as to Blundo. He would have held that the 1972 Amendments were meant to extend only to those employees engaged in loading or unloading

activities between the vessel and the first point of rest if the cargo is being unloaded from the vessel, or the last point of rest if the cargo is being loaded aboard the vessel (A. 42a, 43a).

REASONS FOR GRANTING CERTIORARI

As the Solicitor General has noted in a memorandum in another case pending before the Court,[6] and as the courts themselves have acknowledged, a direct conflict exists among the Circuits on the issue of where compensation coverage under the Act ends for injuries occurring to workmen engaged in handling cargo after that cargo has been unloaded from a vessel and onto the land.

Both the Second Circuit in the instant case and the First Circuit in *Stockman* v. *John T. Clark & Son of Boston, Inc.*, decided July 27, 1976, and reprinted herein at A. 62a, have virtually invited this Court to resolve the divergences of opinion that have arisen as a result of the 1972 Amendments. In the decision below, after noting that the four cases decided in the same opinion "present a question of considerable importance" (A. 3a-4a), Judge Friendly said: "Given the importance of the question, the

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[6] Memorandum for the Federal Respondent at 8, *Gilmore* v. *Weyerhaeuser Co.*, No. 75-1620. The Solicitor General said that "[t]he new shoreside coverage of the Act has produced a great deal of litigation, * * * and there is already a conflict among the circuits concerning the meaning of 'maritime employment' as applied to injuries on land" (footnote deleted). Although the Solicitor General's statement was made before the Fourth Circuit's in banc decision in *I.T.O. Corp. of Baltimore* v. *Benefits Review Board* (August 26, 1976; reprinted herein at A. 113a), the conflict persists following that decision.

The *Gilmore* case involved injuries on navigable waters, and therefore a resolution of its problems would not solve the on-land injury problems of this and the other cases discussed herein. As we shall show, however, some of the language in the Ninth Circuit opinion in *Gilmore* (*Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (1976), does help to illustrate the confusion surrounding the Act's 1972 Amendments.

number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said" (A. 4a-5a). The First Circuit made it a point to quote this precise same language in *Stockman*, calling the present situation in regard to the 1972 Amendments a "judicial melange" (A. 70a).

The *Stockman* court also noted that that case raised "a difficult question of interpreting the 1972 Amendments * * *" (A. 63a), and that the difficulty of determining coverage arose from "the essential ambiguity of the 1972 Amendments insofar as they describe, or fail to describe, the employees for whom coverage is afforded" (A. 64a). The House and Senate Reports, the court said, "go only part way towards clarifying the application of the 1972 amendments in the present situation" (A. 83a). It said that "judicial decisions to date construing the 1972 amendments reflect a sharp difference of opinion over the reach of the Act" (A. 69a).

In *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs*, decided August 5, 1976 (remanded to Board), and reprinted herein at A. 90a, the Third Circuit described its attempted interpretation of the 1972 Amendments as "a task of no little difficulty as several diverging opinions demonstrate" (A. 99a) and added: "We concede, as we must, that the draftsmanship of the 1972 amendments leaves something to be desired and, to a certain extent, obscures [the court's own conception of the Congressional purpose] from view" (A. 107a). And in *I.T.O. Corp. of Baltimore* v. *Benefits Review Board*, 529 F.2d 1080 (1975), the Fourth Circuit granted a petition for rehearing and decided the case in banc "[b]ecause of the importance and novelty of the questions decided" relating to coverage of on-land injuries. *I.T.O. Corp. of Baltimore* v. *Benefits Review*

Board, decided August 26, 1976, and reprinted herein at A. 113a, 117a.

Thus, the courts that have been faced by the questions presented by the instant case have repeatedly recognized that these questions are important and recurring ones, that a resolution of them by reference both to the language of the 1972 Amendments themselves and to their legislative history is extremely difficult, and that divergences of opinion in regard to how the 1972 Amendments should be interpreted redound throughout the Circuits. We submit that a failure by this Court to resolve these questions at an early date will merely result in further confusion and wasted time for Administrative Law Judges, the Benefits Review Board, and the various Courts of Appeals—including those which currently have similar questions under review.[7]

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[7] *Second Circuit:*

Norat v. *United Terminals, Inc.*, 3 BRBS 337 (March 23, 1976), *appeal docketed*, No. 76-4126 (2d Cir., filed May 14, 1976).

Third Circuit:

Maxin v. *Dravo Corporation*, 2 BRBS 372, (Oct. 20, 1975), *appeal docketed*, No. 75-2403 (3rd Cir., filed Dec. 16, 1975); *Suarez* v. *Sea-Land Service, Inc.*, 3 BRBS 17 (Nov. 18, 1975), *appeal docketed*, No. 76-1033 (3rd Cir., filed Jan. 2, 1976); *Farrell* v. *Maher Terminals, Inc.*, 3 BRBS 42 (Dec. 10, 1975), *appeal docketed*, No. 75-1145 (3rd Cir., filed Feb. 6, 1976); *Bradshaw* v. *J.A. McCarthy, Inc.*, 3 BRBS 195 (Jan. 26, 1976), *appeal docketed*, No. 76-1146 (3rd Cir., filed Feb. 6, 1976); *Lind* v. *Independent Pier Co.*, 3 BRBS 232 (Feb. 19, 1976), *appeal docketed*, No. 76-1229 (3rd Cir., filed Feb. 25, 1976); *Muldowney* v. *Lavino Shipping Co.*, 3 BRBS 229 (Feb. 19, 1976), *appeal docketed*, No. 76-1404 (3rd Cir., filed April 2, 1976); *Fairman* v. *J. A. McCarthy, Inc.*, 3 BRBS 239 (Feb. 23, 1976), *appeal docketed*, No. 76-1258 (3rd Cir., filed March 4, 1976); *Santumo* v. *Sea-Land Service, Inc.*, 3 BRBS 262 (Feb. 27, 1976), *appeal docketed*, No. 76-1521 (3rd Cir., filed April 20, 1976); *Cabrera* v. *Maher Terminals, Inc.*, 3 BRBS 297 (March 10, 1976), *appeal docketed*, No. 76-1561 (3rd Cir., filed April 30, 1976).

[Footnote continued on page 11]

There is no question but that the 1972 Amendments were intended to extend compensation benefits in some fashion and to modify this Court's prior ruling that benefits could be afforded solely on account of death or injuries not reachable by state workmen's compensation laws—that is, those beyond the pier on the seaward side.

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[7] [Continued]

Fifth Circuit:

Perdue v. *Jacksonville Shipyards, Inc.*, 1 BRBS 297 (Jan. 31, 1975), *appeal docketed*, No. 75-1659 (5th Cir., filed March 13, 1975); *Ford* v. *P. C. Pfeiffer Company, Inc.*, 1 BRBS 367 (March 21, 1975), *appeal docketed*, No. 75-2289 (5th Cir., filed May 19, 1975); *Nulty* v. *Halter Marine Fabricators, Inc.*, 1 BRBS 437 (May 2, 1975), *appeal docketed*, No. 75-2317 (5th Cir., filed May 20, 1975); *Skipper* v. *Jacksonville Shipyards, Inc.*, 1 BRBS 533 (June 11, 1975), *appeal docketed*, No. 75-2833 (5th Cir., filed July 11, 1975); *Bryant* v. *Ayers Steamship Company*, 2 BRBS 408 (Nov. 13, 1975), *appeal docketed*, No. 75-4112 (5th Cir., filed Nov. 18, 1975); *Luker* v. *Ingalls Shipbuilding*, 3 BRBS 321 (March 19, 1976), *appeal docketed*, No. 76-2157 (5th Cir., filed April 29, 1976); *Kininess* v. *Alabama Dry Dock and Shipbuilding Company*, 4 BRBS 13 (May 18, 1976), *appeal docketed*, No. 76-2505 (5th Cir., filed June 1, 1976).

Seventh Circuit:

Richardson v. *Great Lakes Storage and Contracting Co.*, 2 BRBS 31 (June 26, 1975), *appeal docketed*, No. 75-1786 (7th Cir., filed Aug. 25, 1975).

Eighth Circuit:

Maybes v. *St. Louis Shipbuilding Company*, 3 BRBS 450 (April 29, 1976), *appeal docketed*, No. 76-1530 (8th Cir., filed June 25, 1976).

Ninth Circuit:

Powell v. *Cargill, Inc.*, 1 BRBS 503 (May 30, 1975), *appeal docketed*, No. 75-2655 (9th Cir., filed July 28, 1975); *Kelley* v. *Handcor, Inc.*, 1 BRBS 319 (Feb. 28, 1975), *appeal docketed*, No. 75-1943 (9th Cir., filed April 28, 1975); *Herron* v. *Brady-Hamilton Stevedore Company*, 1 BRBS 273 (Jan. 23, 1975), *appeal docketed*, No. 75-1538 (9th Cir., filed March 7, 1975); *Mezzina* v. *Marine Terminals Corp.*, 2 BRBS 401 (Nov. 12, 1975), *appeal docketed*, No. 76-1041 (9th Cir., filed Jan. 9, 1976).

Nacirema Operating Co. v. *Johnson*, 396 U.S. 212 (1969); see also *Victory Carriers* v. *Law*, 404 U.S. 202, 216 (1971). The problem is: how far did Congress intend to extend coverage? Certainly, as the Ninth Circuit said in *Gilmore*, "[i]n expanding the maritime situs element of the Act, * * * Congress clearly did not intend to broaden the class of covered employees to include *anyone* injured in an adjoining area" (528 F.2d at 960; emphasis in the original).[8]

To date, the various Court of Appeals judges who have considered the question have developed the following conflicting theories:

(a) The earliest views were expressed by Judges Kilkenny, Goodwin and East in the *Gilmore* case. That case, although it dealt with an injury on navigable waters, nevertheless is relevant here in terms of the way the court read certain portions of the 1972 Amendments. The court interpreted the definition of "employee" and the section dealing with injuries occurring upon "navigable waters" (as expanded by the Amendments) to mean that at the time of his injury, the employee, to be covered by the Act, must have been engaged in work realistically related to "the traditional work and duties of a ship's service employment," regardless of whether his employer was a maritime employer (528 F.2d at 961). Thus, the court felt that while the definition of situs, or "navigable waters," had been expanded, the class of employees covered had not been expanded. Since the claimant there, though working on navigable waters, was performing logging work unrelated to the maritime functions of loading or unloading a vessel, he was not covered (*id.* at 961-962). Under this interpretation, the respond-

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[8] See also E. Vickery, "Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act," Ins. Counsel J. 63, 68 (January 1974); Comment, "Broadened Coverage Under the LHWCA," 33 La. L. Rev. 683, 693 (1973).

ent Blundo in the instant case would also not have been covered.

(b) Judges Winter, Haynsworth and Russell in the Fourth Circuit and Judge Lumbard in the Second Circuit disagreed with *Gilmore* in the sense that they thought that the 1972 Amendments did extend coverage, to some degree, to persons not theretofor covered. However, they agreed that the work performed still had to be maritime in nature and that not every person handling cargo between the vessel and the point of discharge to the consignee or point of receipt from the shipper was engaged in maritime employment. On the contrary, they deduced—we believe, correctly—that what Congress intended was to extend coverage to those engaged in longshoring operations when the injury occurred between the ship and, in the case of unloading, the first storage or holding area on a pier, wharf, or terminal adjoining navigable waters, or, in the case of loading, from the last storage or holding area on the pier, etc., to the ship (A. 117a, 41a). This is the "point-of-rest" principle.

By way of example, all three employees in the *Benefits Review Board* case were deemed by the court to be performing functions in the overall loading or unloading of vessels (529 F.2d at 1082). In fact, however, in each case the employee was moving cargo on a vehicle after being unloaded from the vessel and before being picked up by the consignee, or after delivery by the consignee but before being loaded aboard the vessel. Judges Winter, Haynsworth and Russell (and presumably Judge Lumbard) felt that the "situs" test had been met because all three employees had been injured at a terminal, adjoining navigable waters, used in the overall loading and unloading process. However, since each injury had occurred beyond the first or last point of rest, the claimants were not maritime employees at the time of their injuries and had not met the status requirement of the Amendments.

The fact that an employee might have been actually engaged in loading or unloading ships at some *other* periods of his employment was entirely irrelevant; his duties at the time of his accident were determinative of coverage (529 F.2d at 1088 n. 4; A. 117a-118a). Under the view of these judges, respondent Blundo would not have been covered, since his injuries occurred beyond the first point of rest.

(c) Judges Craven and Butzner in the Fourth Circuit and Judges Aldisert, Gibbons and Garth in the Third Circuit rejected the point-of-rest principle and concluded that waterborne cargo remains in maritime commerce until it is picked up by the consignee, and enters maritime commerce when it is delivered by the shipper to the terminal facilities. Thus, in their view, the "loading and unloading" process is a continuous one in the terminal areas involving everyone who handles the cargo in any fashion (529 F.2d at 1092-97; A. 118a-119a, 108a-110a).

Judges Aldisert, Gibbons and Garth conceded that their "terminology" was somewhat different from Judge Craven (A. 108a) and that they were virtually reading the situs requirement out of the Act. Situs, they said, related to where the *vessels* were and not to the situs of the maritime employees at the time of injury (A. 107a), so that even someone driving a truck over public roads between storage areas could be covered (A. 109a-110a). Their *Sea-Land Service* case had to be remanded solely because it was unclear whether the injured employee was trucking a full or empty crate and what the source and destination of the delivery were (A. 119a). Under the theory of this group of judges, respondent Blundo would have been covered under the Act.

(d) Judge Widener of the Fourth Circuit had a variation on this theme—although his views are not entirely clear. He seemed to be saying that while coverage extends beyond the cargo's point of rest, it does not extend

all the way from delivery to the consignee or receipt from the shipper. Rather, if the injury occurs, for example, while the cargo is being moved from its last storage point to the point where the consignee's truck awaits it, there is no coverage because the transfer is for the convenience of the consignee, even though the stevedore's employees are still handling the cargo, and the cargo has not been turned over to whomever the consignee has sent to pick it up (A. 117a-118a). It would appear that respondent Blundo would have been covered under this theory, but it is clear that the opposite would be true of Caputo—a claimant in a case which was decided by the court below in the same opinion covering Blundo—because Caputo was actually helping a consignee's truckdriver load cargo inside the consignee's truck (A. 11a).[9]

(e) Judges Friendly and Oakes of the Second Circuit in the ruling below felt that as to situs, any pier or terminal next to water satisfied the statutory requirement, even if the particular pier or terminal was not used for the loading or unloading of vessels (A. 30a-31a n. 19). They rejected the point-of-rest principle (A. 32a-33a) and instead devised a test whereby there was at least coverage for all persons meeting the situs requirements who are engaged in stripping or stuffing containers or who are engaged in the handling of cargo "up to the point where the consignee has actually begun its movement from the pier (or, in this case of loading, from the time when the consignee has stopped his vehicle at the pier), *provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel*" (A. 39a-40a; emphasis added). Thus, (a) it was the employee's *general responsibilities*, as opposed to his re-

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[9] The court below nevertheless concluded, under its own theory and contrary to what Judge Widener apparently would have concluded, that Caputo *was* covered (A. 11a, 42a).

sponsibility at the time of the accident, that counted (A. 32a, 36a), and (b) under their formulation, an employee could be covered even if working inside the consignee's pick-up truck or the shipper's delivery truck (A. 37a). These judges admitted that this test "goes some way in [the] direction" of reading the status requirement out of the Act (A. 40a). Under the majority's ruling, of course, respondent Blundo was deemed covered by the Act.

(f) Judges Coffin, McEntee and Campbell of the First Circuit, in *Stockman*, dealing with an injured employee substantially in the same position as that of respondent Blundo in the instant case, thought not only that the House and Senate Reports were unclear in situations such as these but that "* * * Congress has seemingly gone out of its way to avoid taking any express stance on the status of those engaged in stuffing and stripping containers as part of the loading and unloading process * * *" (A. 83a). The *Stockman* panel also conceded that "* * * Congress, in moving shoreward, did not see itself as including under the Act whole new groups and classes of employees" (A. 87a).[10] Nevertheless, these judges joined in the interpretation of the Amendments formulated by Judges Friendly and Oakes, with the exception that they refused to pass on the question of whether *any* class of employees—whether the "cargo handlers" in the Second Circuit case or "strippers" like Stockman and Blundo—had to show that they had "spent a significant part of [their] time in the typical longshoring activity of taking cargo on or off a vessel" (A. 87a-89a). Under the

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[10] The First Circuit broadly interpreted situs to include a terminal which was "generally part of the same Boston waterfront area" as the point where the unloading took place. In fact, the terminal was two miles over land from the unloading site, the cargo had been unloaded three days prior to the accident, and the cargo had been brought to the accident site by an independent trucking firm (A. 65a, 77a-78a).

Stockman view, Blundo would have been covered by the Act.

Thus, it is clear that a wide variety of interpretations have developed in regard to what the 1972 Amendments actually cover. But the differences between the judges go far beyond their disagreement over the basic coverage question. They have not even been able to agree on what standards, tests or criteria should be used in deciding the coverage question. A few examples will suffice:

(1) Judges Craven and Butzner believe that great deference is due to the views of the Benefits Review Board, which has consistently applied a broad interpretation of the Act (529 F.2d at 1091-94; A. 118-119). However, both the majority in the instant case (A. 24a-27a) and the panel in *Stockman* (A. 71a-72a) felt that no special deference was due the Board. As Judge Friendly pointed out, the Board is not a policy-making group, and, moreover, its later decisions all rested on early conclusions which were not grounded in experience (A. 24a-27a). The *Stockman* panel agreed (A. 71a).

(2) The majority in the original *Benefits Review Board* decision thought that the views of the Secretary of Labor were significant (529 F.2d at 1084), the majority in the instant case thought his views were not dispositive of the issues (A. 28a-29a), and the *Stockman* panel felt that the Secretary's views were even less significant than those of the Board (A. 72a-73a).

(3) Judges Craven and Butzner in *Benefits Review Board* accorded great weight to the statutory presumption, Section 20, 33 U.S.C. § 920, that a claim falls within the Act (529 F.2d at 1091; A. 118a-119a); the majority in the initial decision in that case ignored the presumption entirely (529 F.2d at 1081-89; see also A. 116a-118a); the majority in the instant case felt that the presumption did not apply to interpretative questions such as those involved here (A. 23a-24a), and the

Stockman panel concluded that the presumption was entitled to no weight whatever (A. 71a).

(4) The *Gilmore* panel felt that the union to which the claimant belonged was an important factor (528 F. 2d at 962), as did the *Stockman* panel (A. 66a-78a), whereas the *Sea-Land Service* court reasoned that this factor was of no consequence (A. 110a), and the majority below apparently adopted the same view (A. 33a).

(5) Finally, both courts and commentators have differed over the Amendments' legislative history. Judges Winter, Haynsworth, Russell, Lumbard, Aldisert, Gibbons, Garth, Friendly, Oakes, Kilkenny, Goodwin and East have all relied heavily upon the legislative history [11] but have reached a variety of divergent interpretations of that history and have produced differing results therefrom. Judges Craven and Butzner believe that it is error even to resort to legislative history, but that if it is resorted to, the legislative history is so ambiguous as to be virtually useless (529 F.2d at 1090, 1095; A. 118a).[12] The *Stockman* court reviewed the legislative history but then concluded that "* * * Congress has seemingly gone

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[11] 529 F.2d at 1086-88; A. 117a; 43a; 104a-108a; 31a-40a; 528 F.2d at 960.

[12] The difficulty with the House and Senate Reports can be illustrated by the following excerpt:

> The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. [See A. 33a-34a.]

While we would submit that this language would clearly exclude someone like respondent Blundo from coverage, some judges have interperted this same language in completely the opposite way in order to provide coverage for someone in Blundo's position. (See discussion above.)

out of its way to avoid taking any express stance on the status of those engaged in stuffing and stripping containers as part of the loading and unloading process just as it is silent on the status of other terminal employees engaged in moving, storing and culling cargo on the pier" (A. 83a).[13] Two commentators take the position that the legislative history should be ignored entirely (G. Gilmore & C. Black, *The Law of Admiralty* § 6.51 at 430 (2d ed. 1975)).

We submit that this is an appropriate time for this Court to adopt the suggestion of several of the Courts of Appeals and to clear up all this confusion surrounding the 1972 Amendments.[14]

We recognize that an argument on the merits is more appropriately reserved for petitioner's brief after certiorari is granted. We would merely point out here, however, that while the majority below repeatedly speaks of the need for " 'a uniform compensation system' " (A. 33a, 36a) and "uniformity of coverage" (A. 35a, 38a)

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[13] The *Stockman* court nevertheless proceeded to attempt to draw certain conclusions from the legislative history—conclusions which we believe to be erroneous (A. 83a-86a).

[14] Both the majority below and the *Sea-Land Service* panel commented unfavorably upon the lack of full records relating to all aspects of the loading and unloading process (A. 21a-23a, 99a, 109a-110a). However, in the light of the large number and frequency of cases coming before the Administrative Law Judges, the expenses involved in developing complete records in any one case, and the wide disparity of practices performed at various terminals around the country, the chances of presenting better and more complete records to this Court in other cases at some point in the future are very slim. Moreover, the less-than-complete records referred to by both groups of judges did not prevent those judges from expressing their views on the basic coverage questions—and this was true even in *Sea-Land Service*, where the case was remanded for a more complete record. We submit that the facts both as to respondent Blundo individually and as to practices generally in the industry as they appear from the various cases are more than sufficient to allow this Court to decide the basic issue of what Congress intended as to the scope of coverage under the 1972 Amendments.

as opposed to "'incongruous results'" (A. 29a) and "'disparity in benefits'" (A. 32a), in fact the application of the theory developed by the majority below to the practices described in these various cases would have exactly the opposite effect from the desired uniformity.

Ships contract with stevedores to load and unload their vessels. Stevedores employ longshoremen from union hiring halls to physically accomplish this work. The stevedore may or may not also be a terminal operator, but terminal operators have entirely separate functions. They receive outbound cargo from stevedores, storing the cargo for indefinite periods [15] and ultimately tendering it to inland consignees. (The reverse procedure applies when the terminal operators receive cargo from inland shippers and, after storage, tender it to stevedores to be loaded on ships.) The delineation between the functions of stevedores and terminal operators is best described by the industry practice associated with the term "point of rest." That point is an explicit one; it clearly divides traditional longshoremen's work—taking cargo on and off vessels—from the myriad activities that are undertaken by terminal operators beyond that point.[16] The standard devised by the majority below and those adopted by the other judges who have not accepted the point-of-rest principle will not bring uniformity of coverage but rather the widest possible disparity in results. When, for example, will an employee handling cargo be deemed

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[15] In one of the cases dealt with by the court below, the cargo had remained "stored" on the pier for 133 days (A. 37a n. 24).

[16] See *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 at 511, 512 (1966); *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F.2d 887, 888 (D.C. Cir. 1962). For a detailed description and analysis of the stevedoring industry as it exists in various ports of the United States, see "The Stevedore & Marine Terminal Industry of the United States," a study prepared by the National Association of Stevedores (1974 and 1974-75 eds.)

to have spent "a significant part of his time" taking cargo on or off a vessel? Is someone who has spent 50 percent of his time in such work to be held covered by the Act, while someone is held excluded from coverage when he has suffered precisely the same injury at precisely the same point doing precisely the same job, but who has at other periods spent only 20 percent of his time in loading or unloading vessels? And does coverage really apply, so long as the situs requirements are met, to anyone handling cargo, including those helping the consignee load his trucks many weeks after the cargo has been unloaded from the vessel? Such a definition could theoretically cover even Teamster drivers carrying cargo over the public roads. In a brief on the merits petitioner can demonstrate that this was never the intent of the Congress [17] and that the hoped-for uniformity [18] can only be achieved by the application of the point-of-rest principle.

The situation as it now exists is indeed a serious one. Approximately 800,000 workers are potentially within the coverage of the Act.[19] The 1972 Amendments have resulted in a huge increase in the number of longshore injuries reported under the Act. In FY 1972, the year preceding enactment of the Amendments, 57,940 longshore and harbor workers' injuries were reported to the

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[17] See J. Doak & A. Hecker, "Is It a New Ball Game?—The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, XI The Forum 544, 549-550 (Winter 1976). One of Congress's intentions was to respond to high insurance costs under the old system. See Note, "Maritime Jurisdiction and Longshoremen's Remedies," 3 Wash. U.L.Q. 649, 666 (Summer 1973). Yet insurance costs under the new decisions have soared to the point where a company like Pittston Stevedoring Corporation, one of the parties in the court below, has had to reduce drastically its stevedoring activities in the New York area.

[18] See Note, 4 Rutgers Camden L.J. 404, 412-413 (Fall 1972).

[19] See J. Doak & A. Hecker, *supra*, XI The Forum at 544.

Labor Department's Office of Workers' Compensation Programs (OWCP).[20] In FY 1974, the first full year of operation under the Amendments, the number of reported cases rose to 136,818, an increase of over 136% (*id.*). In FY 1975, 150,111 longshore injuries were reported, 159% more than in FY 1972 (*id.*).

During this same period, the number of longshore cases eligible for the filing of claims (new "lost time" cases) rose even more rapidly, from 12,003 in FY 1972 to 31,459 in FY 1975, an increase of 162%.[21] The increased number of claims against employers and insurance companies has in turn brought about an increased number of appeals to the OWCP. In FY 1976, the OWCP held approximately 8300 claims conferences on disputed longshore claims, and 743 such cases were referred to Administrative Law Judges for disposition (*id.*). As of September 1, 1976, 464 claims under the Act were pending before Administrative Law Judges in the Department of Labor.[22]

A substantial share of the increased caseload under the Act is directly attributable to the shoreward extension of jurisdiction effected by the 1972 Amendments. By FY 1975, 51% of all longshore injuries reported to the OWCP were classified as arising under the extended

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[20] "Federal Employees' Compensation Act and the Longshoremen's and Harbor Workers' Compensation Act and Extensions, Annual Statistical Report for All Districts Combined, Fiscal Year 1975," compiled by Employment Standards Administration, Office of Administrative Management, U.S. Department of Labor, at 4.

[21] Information obtained from Mr. Donald L. Kress, Chief, Branch of Workers' Compensation Statistics, Division of Management Information and Computer Systems, Office of Administrative Management, Employment Standards Administration, U.S. Department of Labor.

[22] Information obtained from Office of Administrative Law Judges, Department of Labor.

coverage created by the 1972 Amendments.[23] In FY 1976, the percentage of shoreside injuries increased to 57%.[24] As of September 15, 1976, there were 131 longshore injury cases pending before the Benefits Review Board, one-third of which involve the issue of shoreside coverage under the Act.[25] It is apparent that the frequent litigation of this issue is the result of uncertainty as to the proper scope of the new shoreside coverage. That uncertainty and the litigation which it has encouraged are reflected also in the dockets of the Courts of Appeals, where, as noted above, 23 separate cases involving shoreside coverage under the Act are now pending (see n. 7, *supra*).

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[23] "Effect of 1972 Amendments on Injuries Reported Under Longshore and Harbor Workers' Compensation Act, Comparison of Old and Extended Coverage, Fiscal Year 1975," prepared by Branch of Workers' Compensation Statistics, July 22, 1975. (Reprinted in Appendix H hereto.)

[24] "Effect of 1972 Amendments on Injuries Reported Under Longshore and Harbor Workers' Compensation Act, Comparison of Old and Extended Coverage, Fiscal Year 1976," prepared by Branch of Workers' Compensation Statistics, August 1976, (Reprinted in Appendix H hereto.)

[25] The pending longshore injury cases were identified from an examination of the docket of the Benefits Review Board, and an analysis of the Administrative Law Judge decision in each pending case under the Act. The analysis of the Administrative Law Judge decisions in these cases also revealed those Benefits Review Board appeals in which shoreside jurisdiction is an issue.

CONCLUSION

We respectfully urge the Court, for all of the reasons set forth above, to grant certiorari, reverse the decision below, and definitively interpret the 1972 Amendments so as to put an end to the present confusion and the waste of administrative and judicial time and energy that is presently being devoted to this difficult subject.

Respectfully submitted,

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